

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**



U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**

B5

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JAN 11 2011

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen/reconsider on November 20, 2007. The director granted the motion and affirmed his original denial. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a radiology manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director considered the petition under the advanced degree classification set forth in section 203(B)(2) of the Act and determined that based on the certified Form ETA 9089 the position did not require an individual with an advanced degree or its equivalent.<sup>1</sup> The director denied the position accordingly.

On motion, counsel states the petition was also filed under the alien of exceptional ability classification set forth as section 203(B)(2) of the Act and that the director did not examine this classification in his decision. On March 11, 2008, the director reopened the matter and determined that the certified ETA Form 9089 did not demonstrate that the job required an alien of exceptional ability, since the ETA Form 9089 required either a bachelor's degree and five years of experience or an associate's degree and seven years of experience.<sup>2</sup>

Counsel notes that in the petitioner's previous I-140 petition for a radiology technologist, the educational requirement for the position was only a bachelor's degree without any work experience and the job duty was to provide diagnostic imaging services. The earlier position did not require supervision of other technologists., Counsel states that a comparison of the radiology technologist

---

<sup>1</sup> In his decision, the director noted that while the beneficiary had received his bachelor's degree in the Philippines and had been working in the field for 17 years, the certified labor certification stated that the beneficiary's highest academic credential was an associate's degree. The director briefly noted that the ETA Form 9089 and evidence submitted to the record were in conflict with regard to whether the beneficiary possessed the requisite advanced degree or its equivalent for the visa classification, but did not examine this issue further. The AAO will examine more fully whether the beneficiary is qualified to perform the duties of the proffered position as either an individual with an advanced degree or its equivalent, or as an alien of exceptional ability.

<sup>2</sup> The AAO notes that the petitioner previously filed an I-140 petition for the beneficiary under the EB2 visa preference classification for the position of radiology technologist [REDACTED]. The educational requirement for the position was a bachelor's degree without any work experience and the job duty was to provide diagnostic imaging services. This position did not require the supervision of other technologist, or knowledge and understanding of general anatomy, physiology, medical technology and radiography systems. This petition was denied on October 25, 2006. The petitioner also filed a third I-140 petition on June 27, 2008 utilizing the same ETA Form 750 submitted for the first I-140 petition. This third petition was filed under the EB3 visa preference classification [REDACTED].

and the radiology manager positions shows that the position of radiology manager requires an expertise beyond the ordinary radiology technologist.

Counsel also submits correspondence from the [REDACTED] dated October 2, 2006 with regard to a prevailing wage request. The writer states that prevailing wage is \$25.11 per hour. Counsel refers to the Department of Labor (DOL) Standard Occupation Code (SOC) *O\*Net* code of 11-9111, Medical and Health Services Manager, that DOL gave to the proffered position and notes that this job category has a Job Zone of Five-Extensive preparation needed and a Standard Vocational Preparation (SVP) of 8 and above, while the radiology technologist category has a Job Zone of Three-Medium Preparation Needed and a SVP range of 6-7. Counsel submits copies of the *O\*Net* online reports for the position of medical and health services manager and for radiology technologist.

Counsel states that the requirements of a degree of expertise significantly above that ordinarily encountered for the beneficiary's occupation is established by the record. Counsel cites to 8 C.F.R. 204.5(K)(4)(I) and states that this regulation suggests that when the job offer portion of the labor certification demonstrates that the job requires a professional holding an advanced degree or the equivalent, or an alien of exceptional ability, the proffered position falls under the EB2 classification. Counsel appears to state that the petitioner exercised managerial discretion in setting the combination of an associate's degree and seven years of experience as an acceptable alternative to a U.S. bachelor's degree or its equivalent and five years of work experience.

Counsel also requests that consideration be given to the fact that the petitioner is a critical access hospital in a rural and underserved area. Counsel notes that the beneficiary has worked for the petitioner for almost four years, and has expressed a willingness to perform the proffered job and remain in the work area to serve the needs of the community. Counsel submits new letters of support from the petitioner's management and staff in support of the petition.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

Counsel on appeal appears to state that because the proffered position in the instant petition requires higher expertise for entry than the position of radiologic technologist (for which the petitioner sponsored the beneficiary previously), the instant petition is for an alien of exceptional ability.

---

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Counsel's argument holds no weight because the criteria for this classification is based on the terms described on the certified Form ETA 9089, and not by comparison with an earlier petition and job position. Both classifications under the EB2 classification have specific criteria or qualifications that need to be met to establish both that the proffered position requires either an alien with an advanced degree or its equivalent, or an alien of exceptional ability, and that the beneficiary is also qualified to perform the duties of the position as either a professional with an advanced degree or its equivalent, or an alien of exceptional ability. The specific requirements for each classification are discussed below.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

## **Job Requirements**

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.)

The DOL *O\*Net* Online excerpt for Medical and Health Services Managers, 11-9111, referenced by counsel, and available online at <http://online.onetcenter.org/link/summary/11-9111.00> accessed June 7, 2010 and incorporated into the record of proceedings, provides: “Most of these occupations require graduate school. For example, they may require a master’s degree, and some require a Ph.D., M.D., or J.D.” The DOL Handbook of Occupational Titles 2010-2011 edition (Handbook) available at <http://www.bls.gov/oco/ocos014.htm#training> as of June 7, 2010, in the training, other qualifications and advancement section, states:

A master's degree in one of a number of fields is the standard credential for most generalist positions as a medical or healthcare manager. A bachelor's degree is sometimes adequate for entry-level positions in smaller facilities and departments. In physicians' offices and some other facilities, on-the-job experience may substitute for formal education.<sup>4</sup>

We note that the ETA Form 9089 in this matter is certified by DOL. DOL’s role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d* 273 F.3d 874 (9<sup>th</sup> Cir. 2001)

---

<sup>4</sup> In contrast to the health service manager category, the *Handbook* states the following with regard to the education and training of radiology technologists: “Formal training programs in radiography lead to a certificate, an associate degree, or a bachelor's degree. An associate degree is the most prevalent form of educational attainment among radiologic technologists and technicians. Some may receive a certificate. Certificate programs typically last around 21-24 months.” Thus, the alternate requirements for the instant position are more analogous to that of a skilled worker than to a professional with an advanced degree or its equivalent.

(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

As previously discussed, the director referred to the beneficiary's qualifications but declined to state whether the beneficiary was qualified to perform the duties of the proffered position as a professional with an advanced degree or its equivalent. The AAO notes that a United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at \*6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year associate’s degree or an associate’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone, a combination of university studies and work experience, or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”<sup>5</sup> In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor’s degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For the classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an “official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree.” For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.” We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means a bachelor’s degree received *from a college or university*, or an

---

<sup>5</sup> Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

equivalent degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability”).

The record contains the beneficiary’s diploma and transcripts from [REDACTED] Doctors’ College, College of Allied Medical Sciences. The transcript indicates the beneficiary graduated from a three-year course in Radiologic Technology with the title of Associate in Radiologic Technology. Although the transcripts contains prior years of completed university level studies at Southwestern University in 1987 and 1988, there is no indication that these studies were part of the beneficiary’s associate degree in radiology technology. The petitioner submitted an Evaluation of Academics and Experience report dated July 7, 2001 written by [REDACTED]

[REDACTED] combined the beneficiary’s diploma from [REDACTED]’ College, his diploma of radiographer from the American Registry of Radiology Technologist, and his seven years of work experience in radiologic technology to determine that the beneficiary had attained the equivalent of a bachelor of science degree in radiology technology from an accredited U.S. institution of higher education. Thus, the educational evaluation does not find that the beneficiary has a single source foreign degree that is equivalent to a U.S. bachelor’s degree.

The petitioner, a small medical facility with 158 employees and an inhouse radiology department could qualify as a smaller medical facility, and thus a baccalaureate degree in an appropriate field with five years of work experience as a radiology manager could suffice for entry into the proffered position. However, the certified Form ETA 9089 stipulates that an associate’s degree with seven years of prior work experience could also suffice to meet the requirements of the proffered position. Thus, as the director correctly stated, the position does not require a professional with an advanced degree. Thus, the position is not an EB2 category job.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree. Moreover, as the labor certification allows for less than a bachelor’s degree and five years of work experience as a minimum requirements, the position does not qualify for the EB-2 classification.

### **Exceptional Ability**

On motion and on appeal, the petitioner also seeks to classify the beneficiary as an alien of exceptional ability. The AAO will now examine whether the proffered position requires an alien of exceptional ability and whether the beneficiary is an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:



(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

The certified ETA 9089 requires a baccalaureate degree with five years of work experience or an associate's degree with seven years of prior work experience. Section 203(b)(2)(C) of the Act; however, provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the degree required is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the occupation of health services manager, the occupation title identified on the ETA Form 9089, Part F, line 3.

The record establishes that the beneficiary has a three year associate's degree in radiology technology issued by the [REDACTED] Doctors' College in 1991. As stated previously, a three year degree is not the equivalent of a U.S. baccalaureate degree which is usually found to require four years of university-level studies. Further, the beneficiary's academic qualifications are less than the minimum academic requirements outlined in the *O\*Net* for the proffered position. The record does not establish that an associate's degree and seven years of experience signifies a level of expertise that is significantly above that of any other radiology manager. While the petitioner indicates that it will accept less than the minimum academic requirements as certified on the ETA 9089, the lesser degree does not support that the position requires an alien of exceptional ability.

The record also contains numerous certificates as to continuing education courses undertaken by the beneficiary in the Philippines and in the United States in the field of radiology. The AAO notes that none of the beneficiary's university level courses in the Philippines appear to be in the field of health services management, or radiology management. Thus, the petitioner has not established that either the proffered position requires an alien of exceptional ability or that the beneficiary qualifies as an alien of exceptional ability.

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The AAO notes that the certified Form ETA 9089 does not require ten years of fulltime experience, but rather a baccalaureate degree and five years of prior work experience, or an associate's degree and seven years of work experience prior to the priority date. With regard to the letters of work verification, these letters do not support either five years or seven years of previous work experience as a radiology manager, but rather extensive years of prior work as a radiology technologist. As stated by [REDACTED] the petitioner's Human Resources manager, the beneficiary only began his work experience as a radiology manager in 2006,<sup>6</sup> after the current manager resigned. The ETA

---

<sup>6</sup> [REDACTED] in his letter identifies the beneficiary's start date as radiology manager as September 25, 2006.

Form 9089 was filed on December 16, 2006. Thus the only work experience in the record as a radiology manager would be from some earlier date in 2006 to December 16, 2006. Thus the petitioner has not established that the position requires ten years of fulltime experience as a health services manager, or that the beneficiary possesses ten years of work experience as a health services manager.

(C) A license to practice the profession or certification for a particular profession or occupation

The certified Form ETA 9089 does not indicate that a license to practice radiology is required for the position. The petitioner submitted evidence that the beneficiary had obtained a license as a radiology technologist in the state of Kansas. However, the record contains no evidence that a license is required in the [REDACTED] to perform the duties of a radiology manager. While the beneficiary may possess a license, the job certification does not list any such requirement at Section H, item 14, Specific skills or other requirements.<sup>7</sup> Thus, neither the proffered position requires a license, nor would the beneficiary have to possess such a license for the proffered position. The fact that the beneficiary possesses a license from a different state in radiology technology may indicate that the beneficiary has previously performed at a level expected from all other radiology technologists, rather than support a finding that the beneficiary is an alien of exceptional ability. Further while the beneficiary obtained a license from another state, his present skills may also be a function of his lengthy years of work experience as a radiology technologist.

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The record indicates that the DOL personnel in [REDACTED] established a prevailing wage of \$25.11 an hour, Level II, or \$52,228.80 per annum. The petitioner stipulated this hourly rate of pay on the ETA Form 9089. The record does not indicate the beneficiary's actual annual wages; however, there is no evidence in the record that the beneficiary is receiving wages in excess of what any other radiology manager in the [REDACTED] would receive. The record does not indicate that the proffered position, based on its salary, demonstrates that the petition is for an alien of exceptional ability. Thus the petitioner has not established that the proffered position provides a salary that demonstrates exceptional ability, or that the beneficiary receives wages that indicate he is an alien of exceptional ability.

(E) Evidence of membership in professional associations

The certified ETA 9089 does not indicate any required membership in professional associations. The record contains a document from the American Registry of Radiologic Technologists, St. Paul,

---

<sup>7</sup> The specific skills noted at Item 14 are as follows: "Knowledge and understanding of general anatomy, physiology and medical technology, knowledge of PACS and computer radiography systems; physical ability to perform duties with prolonged, extensive or considerable standing and/or walking."

Minnesota that certifies the beneficiary passed an examination and is qualified as a radiographer. Eight certificates of attendance for various radiology or related training courses are in the record, along with a document dated June 17, 1993 that states the beneficiary is a regular member of the Philippine Association of Radiologic Technologist, [REDACTED]. The record is not clear as to whether membership in the Philippine Association of Radiologic Technologist is based on an examination or is open to all radiologic technologists, and whether the beneficiary's membership is current. Thus, the record does not establish that the proffered position requires membership in professional associations, or that the beneficiary's 1993 membership in the Philippine Association of Radiology Technologist would support that he is an alien of exceptional ability.

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The certified ETA 9089 does not indicate that evidence of the beneficiary's recognition by his peers, governmental entities, or professional groups was required. On appeal, the petitioner submitted three letters to the record on appeal. [REDACTED], the petitioner's human resources manager, notes the difficulty of recruiting professionals of the beneficiary's caliber for the petitioner, a critical access hospital in a rural area of less than 2,000 inhabitants. [REDACTED] notes the beneficiary's experience and knowledge in all areas needed to run the hospital's radiology department, including his knowledge of the hospital PACS systems which is used to provide radiology services. [REDACTED], President, Radiology Specialists of [REDACTED], states that the petitioner's radiology department has had a series of chief radiology technologists. [REDACTED] states that these individuals have been fired, or left for various reasons ranging from incompetence, sexual harassment, and inability to perform the job. [REDACTED] states that when the beneficiary was hired, he organized the department as well as any radiology department of its size in the [REDACTED]. [REDACTED] notes that doctors who prior to this refused to send patients to the petitioner because of conflicts with the last technology chief, now use the petitioner's radiology department.

[REDACTED] also noted that the beneficiary oversaw and supervised the installation and utilization of a PACS system so that radiographs taken in the hospital can be interpreted immediately in St. [REDACTED]. [REDACTED] notes that at the beneficiary's insistence, an older CT scanner was replaced with other equipment which greatly improved the quality of CT department, and all technologists have been trained in the performance of CT under the beneficiary's instruction. Dr. [REDACTED] notes that the beneficiary is in the midst of researching different brands of MRI machines to provide inhouse MRI service. [REDACTED] states that the loss of the beneficiary would be a severe blow to the department. The record also has a letter from [REDACTED] attesting to the beneficiary's good character and integrity.

The AAO notes that these letters, while evidence of the beneficiary's contributions to the petitioner's current radiology department, are not considered as evidence of exceptional ability by professional associations, the beneficiary's peers, or governmental entities. They all address the petitioner's need for a competent radiology manager and their desire to keep the beneficiary in his present job; however, they do not document that the proffered position requires an alien of exceptional ability, or

that beyond being a competent employee, the beneficiary is an alien of exceptional ability. As such, the letters do not meet the criterion outlined above.

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 2010 WL 725317, 6 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, U.S. Citizenship and Immigration Services (USCIS) makes a final merits determination as to whether the evidence demonstrates “a degree of expertise significantly above that ordinarily encountered.” 8 C.F.R. § 204.5(k)(2); *see also Kazarian*, 2010 WL 725317 at 3, 6. Only aliens whose achievements have garnered “a degree of expertise significantly above that ordinarily encountered” are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian*, 2010 WL 725317 at 3.

For the reasons discussed above, the petitioner has not submitted evidence that qualifies under at least three of the evidentiary criteria. Moreover, a review of the evidence in the aggregate in the context of a final merits determination is consistent with a determination that the petitioner has not demonstrated that the proffered position requires an alien of exceptional ability or that the beneficiary has “a degree of expertise significantly above that ordinarily encountered.” 8 C.F.R. § 204.5(k)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.